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Supreme Court, U.S.
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No. 03-1270

IN THE

Supreme Court of the United States

JAMES MASON, BILLIE JUNE RICHIE and GLENN BAILEY, individually and on behalf of all others similarly situated,

Petitioners,

v.

R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, PHILIP MORRIS USA INC., LORILLARD TOBACCO COMPANY, LIGGETT GROUP INC., LIGGETT & MYERS, INC. and BROOKE GROUP LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS PHILIP MORRIS USA INC., LORILLARD TOBACCO COMPANY, R.J. REYNOLDS TOBACCO COMPANY, AND BROWN & WILLIAMSON TOBACCO CORPORATION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

Respondent R.J. Reynolds Tobacco Company has the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc. No other publicly held company owns 10% or more of its stock.

Respondent Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company) has BATUS Tobacco Services, LLC as its direct parent corporation, and its ultimate parent is British American Tobacco p.l.c. British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent Philip Morris USA Inc., f/k/a Philip Morris Incorporated, has the following parent corporation: Altria Group, Inc. No other publicly held company owns 10% or more of its stock.

Respondent Lorillard Tobacco Company has the following parent corporation: Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Other subsidiaries of Loews Corporation that are not wholly-owned by Loews Corporation but have some securities in the hands of the public are CNA Financial Corporation, Diamond Offshore Drilling, Inc. and Bulova Corporation. In addition, Texas Gas Transmission, L.L.C., an indirect, wholly-owned subsidiary of Loews Corporation, has issued bonds that are publicly owned. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

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STATEMENT OF THE CASE

Petitioners brought this putative nationwide class action under the Medicare as Secondary Payer statute ("MSP"), 42 U.S.C. § 1395y, against several cigarette manufacturers, seeking double damages for Medicare expenditures incurred in treating alleged smoking-related illnesses. Petitioners advocated an interpretation of the MSP that would allow any Medicare beneficiary to bring unadjudicated, garden-variety tort claims for double damages in federal court whenever the defendant is an uninsured corporation. *See* App. 7a-8a. As the Second Circuit recognized, if adopted, petitioners' interpretation of the MSP would federalize tort law for millions of Medicare beneficiaries, greatly expand federal jurisdiction over state products liability suits, and substantially increase a defendant's liability by imposing the penalty of double damages. The Second Circuit rejected petitioners' theory, concluding that Congress never intended the MSP to provide such a cause of action. App. 7a-10a.

As demonstrated herein, there is no split in the circuits regarding the dispositive issue in this case. No other Court of Appeals has addressed the application of the MSP in the context of an unadjudicated tort claim against an uninsured corporation. In fact, the only other court to consider whether the MSP allows a suit against alleged tortfeasors – the United States District Court for the District of Columbia – reached the same conclusion as the Second Circuit. *See United States v. Philip Morris Inc.*, 156 F. Supp. 2d 1 (D.D.C. 2001).

After the Second Circuit issued its decision, Congress amended the MSP. Congress designed these amendments to make clear that the MSP permits recovery of Medicare

expenditures when liability previously has been determined in favor of the claimant, such as by a judgment or settlement. At the same time, Congress was careful to keep the federal courthouse door closed to unadjudicated tort claims. Contrary to petitioners' suggestion, the Second Circuit was not "silent" on the meaning of these amendments. Rather, in denying petitioners' motion to recall the mandate, the Second Circuit expressly concluded that MSP liability attaches – even under the new amendments – only when the defendant fails to comply with a pre-existing obligation to reimburse Medicare expenditures. App. 107a-108a. No other court has addressed these amendments in any context.

I. The MSP Regime At The Time Of The Decision Below

Under the MSP, Medicare acts as a "secondary insurer" for its beneficiaries. App. 39a-40a. Thus, if a Medicare recipient has other medical insurance, Medicare generally is precluded from paying for medical services. *Id.* However, because the existence of other coverage may be unknown (and unknowable) at the time of treatment, the MSP authorizes Medicare to make "conditional" payments even though a beneficiary has other coverage under another insurance plan. App. 40a-42a. The insurance plan that was primarily responsible for making the payment is then obligated to reimburse the Medicare Trust for its conditional payment. *Id.*

Insurance plans subject to the MSP are referred to as "primary plan[s]." *Id.* "Primary plans," in turn, are defined to include group health plans, "workmen's compensation law[s] or plan[s]," and "liability insurance polic[ies] or plan[s]," including "*self-insured plan*[*s*]." App. 40a (emphasis added).

Thus, the structure of the MSP is relatively straightforward. If Medicare makes a conditional payment when a Medicare beneficiary has coverage under another insurance plan, then Medicare may seek reimbursement for such payments from the primary plan whenever the primary plan is determined to be "required or responsible . . . to make payment" under the statute. *See* App. 41a. MSP liability, therefore, turns on whether the primary plan was obligated to cover its insured's medical expenses.

The MSP allows the federal government to bring an action against the "entity which is required or responsible . . . to make payment . . . under a primary plan." *Id.* The MSP also provides Medicare beneficiaries with a private cause of action. Under the private cause of action provision, Medicare beneficiaries may bring a suit for double damages for Medicare expenditures against those "primary plan[s] which fail[] to provide for primary payment." App. 42a.

In short, MSP liability attaches only (1) to "primary plan[s]," including "self-insured plan[s]," that (2) are obligated to make a payment under the plan. App. 40a-41a. Pursuant to these provisions of the MSP, the Centers for Medicare and Medicaid Services ("CMS") promulgated regulations clarifying two key terms used in the statute: "self-insured plan" and "plan." Under these regulations, "self-insured plan" meant "a plan under which an individual, or a private or governmental entity, carries its own risk instead of taking out insurance with a carrier." App. 54a. The regulations further defined a "plan" as "any arrangement, oral or written, by one or more entities, to provide health benefits or medical care or [to] assume legal liability for injury or illness." App. 48a. When promulgating this definition of "self-insured plan," CMS emphasized

that "uninsured" did not mean "self-insured": "[T]he mere absence of insurance purchased from a carrier does not necessarily constitute a 'plan' of self-insurance." App. 89a-90a.

These same rules govern a claim involving tort liability insurance. At the time of the alleged tort, there is no determination that the alleged tortfeasor is liable for any medical costs. Accordingly, where the Medicare beneficiary has a potential tort claim, Medicare's payment is considered conditional. App. 55a; *see also* H.R. Rep. No. 101-247, at 1021 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2492 ("In cases involving liability insurance, providers are instructed to bill Medicare first for conditional payments, and Medicare subsequently recovers its costs from the liability insurer of the person who caused the injury."). Medicare (or the beneficiary) then may assert a claim for reimbursement from the private insurance carrier, but only "*after, and to the extent that, such carrier's liability under the private policy for the services has been determined.*" Medicare as Secondary Payer and Medicare Recovery Against Third Parties, 54 Fed. Reg. 41,727 (Oct. 11, 1989) (quoting H.R. Rep. No. 96-1167, at 389 (1980)) (emphasis added). The same regulations apply where the potential tortfeasor has internalized the insurance function by adopting a "self-insured plan." If and when tort liability is established, the tortfeasor is obligated to reimburse Medicare for its conditional payment, and the failure to do so gives rise to a cause of action under the MSP. *See* App. 49a.

II. Federal Enforcement Of The MSP

In the late 1990s, the federal government began litigating MSP claims against manufacturers that entered into class action settlements. *See Fanning v. United States*, 346 F.3d

386 (3d Cir. 2003) (orthopedic bone screw settlement); *In re Diet Drugs Prods. Liab. Litig.*, Nos. MDL 1203, Civ.A. 99-20593, 2001 WL 283163 (E.D. Pa. Mar. 21, 2001) (diet drugs settlement); *In re Dow Corning Corp.*, 250 B.R. 298 (Bankr. E.D. Mich. 2000) (breast implants settlement). In these cases, the government unsuccessfully sought to recover medical costs it paid on behalf of Medicare beneficiaries from the proceeds of the settlement. The government argued that the defendant-manufacturers who contributed to the class action settlement funds were "self-insured plan[s]." *See, e.g.*, *Fanning*, 346 F.3d at 400. Following these mass-tort settlement cases, the government took its MSP theory a step further and began asserting MSP claims based on the settlement of a single-plaintiff tort case. *E.g.*, *Thompson v. Goetzmann*, 337 F.3d 489 (5th Cir. 2003).

The government's MSP theory drew sharp criticism from the Courts of Appeals[1] and was uniformly rejected by the lower courts.[2] In *Thompson*, for example, the government

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1. The Third Circuit sharply criticized the government's "heavy-handed collection tactics under the MSP," and found that the government's approach was "more suggestive of tactics one might attribute to a less than reputable collection agency than to one's own government." *Fanning v. United States*, 346 F.3d 402, 402 n.17 (3d Cir. 2003). Likewise, the Fifth Circuit warned the government not to continue its "frivolous litigation," commenting that the government's interpretation of the MSP "appear[ed] to be intended to convert the MSP [statute] from an important and sensibly fashioned fiscal cost-cutting measure into a mere, heavy-handed collection tool." *Thompson v. Goetzmann*, 337 F.3d 489, 504 (5th Cir. 2003).

2. *See Thompson*, 337 F.3d 489; *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 202 F.R.D. 154, 162-69 (E.D. Pa. 2001), *rev'd sub nom on other grounds*, *Fanning v. United States*, 346 F.3d

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asserted an MSP claim against a hip prosthesis manufacturer based on its settlement of an individual products liability action. 337 F.3d at 493. The Fifth Circuit rejected the government's argument that an alleged corporate tortfeasor was a "self-insured plan" under the MSP due to its corporate form. *Id.* at 502 ("[T]here is simply no statutory support for the government's position that uninsured 'sophisticated corporations' are *per se* self-insurers."). Rather, the Fifth Circuit concluded that a "self-insured plan" required a pre-existing arrangement involving a reserve of funds and disbursement procedures:

> [I]n the sense used in the MSP statute, a "primary plan" of "self-insurance" requires an entity's *ex ante* adoption, for itself, of an arrangement for (1) a source of funds and (2) procedures for disbursing these funds when claims are made against the entity.

Id. at 498 (citations omitted). Because the corporate manufacturer was not a "self insured plan," the court affirmed the dismissal of the government's claim. *Id.* at 504.

Despite this consensus, the Eleventh Circuit concluded in late-2003 that the government could assert an MSP claim based on a mass-tort settlement. *United States v. Baxter Int'l, Inc.*, 345 F.3d 866 (11th Cir. 2003), *pet. for cert. filed*, No. 03-1341 (Mar. 22, 2004) ("*Baxter*"). In *Baxter*, the

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402 (3d Cir. 2003); *In re Diet Drugs Prods. Liab. Litig.*, Nos. MDL 1203, Civ.A.99-20593, 2001 WL 283163, at *9-12 (E.D. Pa. Mar. 21, 2001); *In re Dow Corning Corp.*, 250 B.R. 298, 337-41 (Bankr. E.D. Mich. 2000).

government brought an MSP claim against breast implant manufacturers who settled a class-action products liability suit and created an MDL-settlement fund. The Eleventh Circuit held that the defendants operated "self-insured plans" under the MSP because the defendants had an "*ex ante* arrangement" to "assume responsibility and liability" for the claimants' medical costs. *Id.* at 895-97. In support of its conclusion, the Eleventh Circuit relied on a number of factors, including the defendants' settlement and deductible payments. *Id.* at 899 & n.27.

III. Congress' Recent Amendments To The MSP

Seeking to reverse its litigation losses, the Department of Justice ("DOJ") asked Congress to change the MSP. Shortly after *Thompson* was decided, U.S. Assistant Attorney General William E. Moschella submitted a letter to Rep. Billy Tauzin, Chairman of the Committee on Energy and Commerce, regarding proposed amendments to the MSP. The letter stated that the proposed amendments would protect the fiscal integrity of Medicare by resolving "contentious litigation" surrounding the scope of the MSP:

> [The MMA] would protect the integrity of the Medicare Trust Fund by clarifying that Medicare must be reimbursed whenever another insurer's responsibility to pay has been established. The Section is consistent with the litigation positions taken by this Department and the Department of Health and Human Services ("HHS") in numerous courts cases. . . . Some recent court decisions have held, however, that Medicare has no right to reimbursement. . . . *See, e.g., Thompson v. Goetzmann*, 315 F.3d 457 (5th Cir. 2002). These

> rulings make the statute's reimbursement mechanism inoperative in some jurisdictions. Section 301 of this legislation would end this costly litigation and provide clear legislative guidance regarding Medicare's status as a secondary payer of health benefits.

149 Cong. Rec. S8,535 (2003).[3]

Senators Bob Graham and Tom Harkin subsequently offered the DOJ Letter into the record. 149 Cong. Rec. S8,276 (2003) (statement of Sen. Graham); 149 Cong. Rec. S8,535 (2003) (statement of Sen. Harkin). Senator Graham explained that the amendments were designed to correct "a recent court opinion," presumably *Thompson*:

> For most of the history of Medicare, the assumption has been that if a person had double coverage, the primary payer would be that payer other than Medicare, and Medicare would wrap around that primary payer. A recent court opinion has reversed that assumption. There is a provision, which is included in Chairman Tauzin's House Energy and Commerce Committee mark, supported by the Justice Department, that would clarify the circumstances in which Medicare is the secondary payer.

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3. In addition, William H. Jordan, Senior Counsel to the Assistant Attorney General, testified in support of the MSP amendments. In his testimony, Senior Counsel Jordan stated that the *Thompson* decision "highlight[ed] the need for corrective legislative action," and urged Congress to step in to resolve the "contentious litigation" surrounding the MSP. *Waste, Fraud and Abuse in Federal Programs: Hearing Before the House Comm. on Ways and Means*, 108th Cong. (2003), *available at* 2003 WL 21667339.

Id. The House Report ultimately adopted the DOJ's rationale for the MSP amendments. *See* H.R. Rep. No. 108-178(II) (2003), *available at* 2003 WL 21690538.

On December 8, 2003, President Bush signed the MSP amendments into law as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, P.L. 108-173, 117 Stat. 2066 (Dec. 8, 2003) ("MMA"). The MMA amended the MSP statute in three principal respects.

First, the amendments clarified Medicare's right to make conditional payments yet still seek reimbursement. The amendments modified the description of when Medicare may make payments and also added a new paragraph regarding Medicare's authority to make conditional payments. App. 31a.

Second, the amendments added new language regarding the meaning of a "self-insured plan." The amendments inserted the following sentence after the definition of "primary plan": "An entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part." App. 32a. This provision was meant to include uninsured companies within the meaning of "self-insured plan," thereby reversing *Thompson* and allowing MSP suits in cases involving tort settlements. *See* H.R. Rep. No. 108-178(II) (2003), *available at* 2003 WL 21690538.

Third, the amendments clarified the circumstances under which a "primary plan" may be held liable under the MSP. Under existing law, Medicare or its beneficiaries could file a

lawsuit under the MSP against a primary plan only when the primary plan was required to make payment to Medicare. The amendments expressly confirmed that a primary plan is not required to make payment to Medicare, for purposes of the MSP, until there has been a determination of the tortfeasor's liability; the mere pendency of an unadjudicated tort claim does not create an obligation to make a payment under the MSP:

> A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.

App. 32a.

Congress purported to make these changes to the MSP statute retroactive. The new definitions of "self-insured plan" and "primary plan" were made retroactive to 1980, while the remaining changes were made retroactive to 1984. *See* App. 33a-34a. CMS has not yet promulgated new regulations addressing the amended MSP provisions.

IV. The Lawsuit And The Decisions Below

In this case, a proposed nationwide class of Medicare beneficiaries sought recovery of Medicare expenditures for the treatment of illnesses allegedly caused by cigarettes. App. 2a. The proposed class action was based on various theories of state tort liability, including strict liability and

breach of implied warranty. Petitioners based these claims on allegations that defendants intentionally denied, concealed and manipulated the "addictiveness of their cigarettes." Pet. at 8.[4]

The district court dismissed petitioners' claim on the ground that defendants were not "self-insured plan[s]" under

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4. These class action allegations were no different from those that numerous federal and state courts throughout the country previously have rejected as insufficient to support class certification. To date, seventeen federal district courts and two federal courts of appeals have held that smoking-and-health claims similar to those asserted here may not be treated on a class-wide basis. *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Ellington v. Philip Morris Inc.*, No. CV-S-02-1108-LDG, 2003 U.S. Dist. LEXIS 12114 (D. Nev. July 10, 2003); *Sims v. Philip Morris Inc.*, No. 1:01-CV-01107, slip op. (D.D.C. Feb. 10, 2003); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150 (S.D. Iowa 2001); *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261 (D. Nev. 2001); *Guillory v. Am. Tobacco Co.*, No. 97 C 8641, 2001 WL 290603 (N.D. Ill. Mar. 20, 2001); *Aksamit v. Brown & Williamson Tobacco Corp.*, No. C.A. 6:97-3636-24, 2001 WL 1809378 (D.S.C. Dec. 29, 2000); *Walls v. Am. Tobacco Co.*, No. 97-CV-0218-H, 2000 U.S. Dist. LEXIS 16040 (N.D. Okla. Oct. 19, 2000); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544 (D. Minn. 1999); *Hansen v. Am. Tobacco Co.*, No. LR-C-96-881, 1999 U.S. Dist. LEXIS 11277 (E.D. Ark. July 21, 1999); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Chamberlain v. Am. Tobacco Co.*, No. 1:96 CV 2005, 1999 U.S. Dist. LEXIS 5843 (N.D. Ohio Apr. 12, 1999); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998); *Insolia v. Philip Morris Inc.*, 186 F.R.D. 535 (W.D. Wis. 1998); *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997); *Tijerina v. Philip Morris Inc.*, No. CIV.A. 2:95-CV-120-J, 1996 WL 885617 (N.D. Tex. Oct. 8, 1996); *see also Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W.Va. 1997).

the MSP and further indicated that it would deny petitioners' motion for class certification. App. 18a, 23a (Weinstein, J.). The court found that petitioners' MSP claim was based on an "imaginative but inappropriate interpretation" of the statute. App. 19a. Petitioners' theory, the district court concluded, "would distort the federal-state substantive tort balance by creating a harsh (double recovery) shadow federal tort action in any case where [M]edicare payments were made on behalf of any person injured by a delict." *Id.*

The United States Court of Appeals for the Second Circuit affirmed the dismissal of petitioners' MSP claims. App. 15a. The Second Circuit held that defendants, as alleged tortfeasors, were not "self-insured plan[s]" subject to suit under the MSP. App. 6a-10a. The court determined that a "self-insured plan" under the MSP requires "some type of formal arrangement by which an entity consciously undertakes to set aside funds to cover potential future liabilities and a formal procedure for processing claims made against that fund pursuant to the terms of the 'plan.'" App. 10a. The court further held that MSP liability did not attach to alleged tortfeasors, but instead required an established obligation to pay medical costs. App. 12a-14a.

The court rejected petitioners' argument that large corporations or publicly traded corporations were "self-insured plan[s]" as a matter of law because of their corporate structure. App. 7a-8a. The court concluded that such a theory would transform every corporation – large or small, public or closely held – into an insurance company subject to double damages under the MSP. *Id.*

The court further rejected petitioners' argument that respondents were self-insured plans because of public

statements by some companies that they would satisfy any future tort liability through company funds. App. 9a-10a. Petitioners did not allege that respondents established any sort of plan to cover the health care expenses of smokers, but only that respondents "made a decision to set aside funds to cover potential future tort liability." App. 10a. The court determined that these allegations merely asserted an "absence of insurance," not the existence of a formal plan to cover healthcare expenses. App. 9a. Relying on the CMS regulations, the court reasoned that the "mere absence of insurance" did not constitute a "self-insured plan" under the MSP. *Id.*

Petitioners moved the Second Circuit for rehearing and rehearing *en banc*. *See* App. 29a. While their petition for rehearing was pending, petitioners brought the December 2003 MSP amendments to the Second Circuit's attention by letter submission. Petitioners argued that the new definition of "self-insured plan" meant that alleged tortfeasors were now subject to suit under the MSP. App. 101a-103a. Respondents, however, pointed out that petitioners' argument ignored the provision in the amendments clarifying that a primary plan is not "required or responsible" to pay until there is a final judgment, settlement or similar resolution of an underlying tort claim. App. 33a; App. 104a-106a. The same day that respondents filed their submission, the Second Circuit denied rehearing. App. 29a-30a. The Second Circuit subsequently treated petitioners' letter submission as a motion to recall the mandate and denied the motion. App. 107a-108a. The Second Circuit expressly adopted respondents' position, concluding that the amendments did not make petitioners'

contested, unliquidated tort claims cognizable under the MSP:

> [T]he new amendments clarify only that an entity "shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance or otherwise)," but do not alter the principle, previously recognized, that "MSP liability attaches only to an entity that is required or responsible to pay under a 'primary plan,'" *Mason v. American Tobacco Co.*, 346 F.3d 36, 42 (2d Cir. 2003), a principle inapplicable to the alleged tortfeasors in this case.

Id. Notably, petitioners here again ignore the provision in the amendments clarifying that a primary plan is not "required or responsible" to reimburse Medicare until liability is independently established.

REASONS FOR DENYING THE PETITION

Petitioners claim a "square conflict" exists between the Second Circuit's opinion here and that of the Eleventh Circuit in *Baxter.* Pet. at 21. But both the *Mason* court and the *Baxter* court expressly found no conflict between the two cases. App. 11a-12a; *Baxter*, 345 F.3d at 896 n.22. Indeed, the Eleventh Circuit – addressing the MSP's application to a settlement fund – expressly agreed with the central holding of *Mason* that the MSP does not provide a federal forum to Medicare beneficiaries for unadjudicated tort claims against alleged corporate tortfeasors. *Baxter*, 345 F.3d at 896 n.22. Petitioners' purported conflict simply does not exist.

More fundamentally, even if a conflict did exist, Congress already has stepped in to resolve it. In the recent amendments, Congress provided that the MSP allows recovery of Medicare expenditures against an entity that "carries its own risk," but only when the tort claim has resulted in a judgment or settlement – *not* where the tort claim is unadjudicated. Apart from the Second Circuit's ruling on these amendments, no court has considered the MSP amendments in any context.

I. There Is No Circuit Split Regarding The MSP's Application To Alleged Tortfeasors

The absence of a conflict between the *Mason* and *Baxter* decisions is clear from the face of the decisions themselves. In this case, petitioners, purporting to represent a nationwide class of Medicare beneficiaries, sought double recovery of Medicare expenditures for the treatment of illnesses allegedly caused by cigarettes. App. 2a-4a. Petitioners did not allege that there was a prior determination of tort liability against the respondents. Nor did the petitioners allege that respondents had any contractual or assumed obligation to cover any beneficiary's medical expenses. Rather, petitioners asserted disputed and unliquidated state tort claims against respondents.

By contrast, *Baxter* did not involve unadjudicated tort claims. Rather, *Baxter* involved the settlement of an MDL products liability suit against the manufacturers of silicone breast implants. *Baxter*, 345 F.3d at 872-73. Under the terms of the settlement agreement, the manufacturers created a settlement fund dedicated to pay for the covered medical care of the plaintiff-class members, as well as a claims

process to oversee disbursements from the fund. *Id.* at 873. Over 400,000 women registered as potential claimants. *Id.* at 874.

Both the Second Circuit and the Eleventh Circuit correctly viewed the two cases as raising fundamentally different issues. In *Baxter*, unlike *Mason*, the defendants had assumed an obligation to make payment through the creation of the settlement fund. In *Mason*, no such fund was established. The tobacco manufacturers never assumed a duty to pay unadjudicated tort claims, but instead contested liability for petitioners' medical costs.

The Second Circuit relied on this fundamental difference between the two cases in concluding that there was no conflict:

> [*Baxter*] is clearly distinguishable. Through the establishment of a settlement fund, the *Baxter Int'l* defendants had assumed obligations to pay for the medical costs of plaintiff class members . . . . The instant case presents a far different situation. Here the plaintiffs are asserting claims under the MSP statute against alleged tortfeasors who have yet to assume the medical costs of any identifiable group of individuals.

App. 11a.

The Eleventh Circuit likewise found "no tension" between its decision and the trial court decision in *Mason*, expressly agreeing with the Second Circuit's ultimate conclusion that "the MSP requires the existence of some sort of plan as opposed to a mere *post hoc* assumption of liability."

Baxter, 345 F.3d at 896 n.22.[5] Applying these principles, the Eleventh Circuit concluded that, unlike the *Mason* case, the defendants had an "*ex ante* arrangement" to "assume responsibility and liability" for the registered claimants' medical costs. *Id.* at 895-97.

To be sure, the Eleventh Circuit's decision in *Baxter* may have created a circuit-split regarding whether the MSP applies to tort settlements. *See Fanning v. United States*, 346 F.3d 386, 400 n.13 (3d Cir. 2003) ("[T]he government's argument that a 'self-insured plan' includes a fund created by a tortfeasor to settle litigation has engendered a circuit split. The Fifth Circuit . . . rejected the government's argument, while the Eleventh Circuit . . . accepted it.").[6] But that issue is not presented here. This case does not involve a settlement, but an unadjudicated and contested tort claim.

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5. Petitioners claim that *Baxter*'s distinction was based on a "misapprehension" of this case. Pet. at 20 n.10. The Eleventh Circuit did not "misapprehend" *Mason*. As the Second Circuit recognized, petitioners based their MSP claims on the fact that respondents are "alleged tortfeasors who have yet to assume the medical costs of any identifiable group of individuals." App. 11a. Accordingly, the Eleventh Circuit's characterization of this case was correct. *Baxter*, 345 F.3d at 896 n.22.

6. Petitioners suggest that the Ninth Circuit's decision in *Zinman* somehow factors into the conflict between the Eleventh Circuit and Fifth Circuit. Pet. at 22. In *Zinman v. Shalala*, 67 F.3d 841 (9th Cir. 1995), the Ninth Circuit considered whether the government could recover the full costs of its Medicare expenditures from a Medicare beneficiary even when the beneficiary received a discounted settlement from his insurance company. *Id.* at 843. While marginally relevant to the *Baxter*/*Thompson* conflict, *Zinman* has nothing to do with this case.

In short, no court has concluded that the MSP applies to unresolved tort claims against alleged tortfeasors. The only Court of Appeal to address this question – the Second Circuit – held such a result was never intended by Congress. The power of Congress to "legislate in areas traditionally regulated by the States" is "an extraordinary power in a federalist system," and "a power that we must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Thus, when regulating sensitive areas affecting the federal-state balance, Congress must make "its intention to do so unmistakably clear in the language of the statute." *Id.* at 460-61 (quotations and citation omitted); *see also Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543-44 (2002). Nothing in the text of the MSP or its legislative history even hints that Congress intended to create a broad-ranging statute "federalizing" tort law whenever the plaintiff happens to be a Medicare beneficiary. Such a result would fundamentally change federal-state relations and greatly expand the jurisdiction of federal courts for generic tort claims.[7] Moreover, the Second and Eleventh Circuits – though addressing different situations – agreed on the essential legal principles forming the basis of their respective opinions. There is no legal disagreement warranting this Court's review.

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7. Where Congress has intended to subject tortfeasors to suit in federal courts, it has done so unmistakably. For example, the Medical Cost Recovery Act expressly allows the federal government to recover medical payments from alleged tortfeasors under certain specified conditions. *See* 42 U.S.C. § 2651(a).

II. Congress' Recent Changes To The MSP Obviate Any Need For This Court's Review

Faced with a circuit conflict regarding the MSP's application to tort settlements, the Department of Justice asked Congress to amend the MSP to reverse *Thompson*. Congress acted to resolve any future conflict or dispute.[8]

In December 2003, Congress passed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA"), Pub. L. No. 108-173, 117 Stat. 2066 (Dec. 8, 2003). Congress carefully designed these amendments to address the *Thompson/Baxter* settlement situation, but, at the same time, not provide a federal vehicle for unadjudicated tort claims.

Under the MSP, an entity is liable only if it fails to make a payment that it is required or responsible to pay under the primary plan. App. 42a; *see also* App. 12a ("MSP liability attaches only to an entity that is '*required or responsible' to pay* under a 'primary plan.'") (emphasis added). The amendments clarified the circumstances under which an entity is required or responsible to pay Medicare. Under the amendments, an entity is not "required or responsible to pay" a disputed, unliquidated tort claim. Rather, an entity is "required or responsible to pay" *only* where there has been a final judgment, settlement, or similar resolution of an underlying tort claim:

> A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise,

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8. Likewise, petitioners' claim that this case deserves review because of "loose dicta of other circuits" has been rendered moot by Congress' amendments. *See* Pet. at 22.

> waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.

App. 32a. Thus, the MSP amendments may have broadened the definition of a "self-insured plan." However, the amendments also confirmed the Second Circuit's prior conclusion that "the trigger for bringing a MSP claim is not the pendency of a disputed tort claim, but the established obligation to pay medical costs." App. 13a-14a. Whatever the effect on MSP claims involving settlements such as *Baxter* and *Thompson*, the amendments do not change the result here where the underlying claims remain unliquidated and contested.[9]

As the Second Circuit recognized, the new provision is entirely consistent with pre-existing regulations and caselaw with respect to the application of the MSP to this case. App. 107a-108a. Before these amendments, Medicare made a conditional payment where the beneficiary had a potential tort claim against a third-party. App. 55a; *see also* H.R. Rep. No. 101-247, at 1021 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2492. The new amendments codify this regulatory framework, making clear that finality of the underlying tort claim is a pre-requisite to asserting MSP liability based on a tort.

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9. Furthermore, even if petitioners' interpretation of the amendments was adopted, they still would not apply to this lawsuit. As interpreted by petitioners, the MSP amendments raise serious constitutional issues, including the unconstitutionality of the retroactive imposition of liability under these circumstances. *See, e.g., E. Enters. v. Apfel*, 524 U.S. 498 (1998).

The legislative history of the MSP amendments reinforces the finality requirement. In amending the MSP, Congress sought to correct the Fifth Circuit's *Thompson* decision – a case barring Medicare from recovering its costs where the parties had *settled* the underlying tort claim. *See* H.R. Rep. No. 108-178(II) (2003), at 189-90, *available at* 2003 WL 21690538; *see also* 149 Cong. Rec. S8,276 (2003) (statement of Sen. Graham); 149 Cong. Rec. S8,535 (2003) (statement of Sen. Harkin). This legislative history indicates that Congress intended the MSP amendments to clarify that an MSP claim can be asserted – and Medicare payments recovered – only after a determination (either by adjudication or settlement) of the tortfeasor's obligation to pay medical costs.[10]

Finally, petitioners warn that the Second Circuit's decision "delivers a devastating blow" to Medicare's financial integrity. Pet. at 23. Petitioners claim that the Second Circuit effectively held that "all tortfeasors are beyond the reach of Medicare's MSP rights to reimbursement." Pet. at 24. This is not true. Under certain conditions, tortfeasors are subject to the MSP, but *alleged* tortfeasors are not. MSP liability only attaches after there is a determination that the defendant had a duty to pay the plaintiff's medical costs.

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10. Petitioners ignore the House Report and rely instead on comments by Senator Charles E. Grassley. Pet. at 16. Senator Grassley is expected to file an *amicus curiae* brief in support of petitioners, as he did in the proceedings below. Senator Grassley's interpretation of the MSP, like petitioners', ignores the critical statutory language requiring finality of the underlying tort claim. In any event, the personal views of an individual legislator do not reflect the intent of Congress. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Nat'l Woodworker Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967).

Imposing MSP liability *before* a determination of an obligation to pay has never been considered essential to Medicare's financial integrity. Indeed, other than suits against cigarette manufacturers, neither Medicare nor Medicare beneficiaries have ever attempted to assert unadjudicated tort claims under the MSP at any point in its twenty-plus year history.

Furthermore, to impose double damages before there has been any determination that the defendant has a duty to reimburse Medicare would be harsh and draconian. The MSP's double damages provision only makes sense where the "primary plan" breaches a pre-existing duty to pay. There is nothing in the language of the amendments or their legislative history that indicates that Congress intended to modify the MSP to penalize a corporate defendant with a double damages penalty for simply contesting its liability in a tort suit. The "unmistakably clear" language required for the kind of fundamental shift in the federal-state balance that petitioners propose is wholly absent from the text of the amendments or their legislative history. *See Gregory*, 501 U.S. at 460. If Congress intended the MSP to provide Medicare beneficiaries with a federal forum to bring unadjudicated tort claims against uninsured corporate defendants for double damages, Congress would have said so directly.[11]

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11. Petitioners erroneously argue that the Second Circuit opinion would leave Medicare with fewer rights than a private insurance company. Pet. at 24. In fact, the United States can pursue traditional subrogation rights, intervene in private tort actions by the Medicare beneficiary against the alleged tortfeasor, or pursue beneficiaries who fail to remit any sums that should be reimbursed to Medicare. App. 40a-42a; *see also* App. 50a.

III. Petitioners' Remaining Issues Do Not Provide A Basis For This Court's Review

Petitioners' third and fourth questions for review also do not warrant this Court's discretionary review. In their third question presented, petitioners assert that the Second Circuit failed to "consider, much less defer to, [agency] regulations" in accordance with *Chevron*. Pet. at 25-27. Petitioners' error is clear from the face of the Second Circuit's decision. The Second Circuit cited, relied upon, and even quoted the relevant regulations – all of which support the dismissal here. *See* App. 6a.

Beyond that, the Second Circuit found no need to defer to the government's litigation position on the meaning of the MSP. The court held that it need not defer to a statutory position that is "nothing more than the litigation position of agency counsel that is wholly unsupported by regulations, rulings, or administrative practice." App. 14a. (quoting *Thompson*, 337 F.3d at 502). The Second Circuit concluded: "Because we believe that plaintiffs' interpretation of the MSP statute is essentially the same unsupported interpretation of the MSP statute urged by the federal government, we do not believe this Court need pay it the substantial deference called for by *Chevron*." *Id.*

In their fourth question presented, petitioners suggest that this Court should grant review to address the standard governing motions to dismiss. Pet. at 27-29. Petitioners made the same claim below, arguing that the district court failed to properly credit the allegations in their complaint. Despite the liberal pleading standards of Fed. R. Civ. P. 12(b)(6), the Second Circuit – as well as the district court – properly recognized that legal conclusions in the guise of factual

allegations will not suffice to prevent a motion to dismiss. App. 10a. Petitioners' conclusory assertions that defendants are "self-insured plans" within the meaning of the MSP failed to satisfy Rule 12(b)(6). *See, e.g., Papasan v. Allain*, 478 U.S. 265, 286 (1986) (noting court is "not bound to accept as true a legal conclusion couched as a factual allegation").[12]

In any event, both of these issues are irrelevant in light of the recent amendments. Nothing about *Chevron* deference or the standard of review changes the fact that petitioners asserted an unliquidated tort claim. Irrespective of whether or not respondents are "self-insured plans," they had no obligation to reimburse Medicare under the MSP until tort liability was established. Accordingly, the Second Circuit correctly affirmed the dismissal of petitioners' claims.

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12. Petitioners' allegation amounted to nothing more than a claim that respondents are uninsured corporations. For example, petitioners alleged that respondents made the "deliberate" decision "to rely on [their] assets to cover . . . liability," App. 118a-119a, and that "defendants have in large part chosen to carry their own risk of legal liability for tobacco-related illnesses rather than taking out insurance" by relying on their ability to pass on any liability to their consumers in the form of increased prices. App. 119a. Petitioners also rely on extra-record factual material, never submitted to the district court. Pet. at 28 n.19. Beyond that, even these materials at best support their allegations that respondents are uninsured corporations – and therefore rely on their assets to pay any potential tort judgments and pass increased costs on to consumers. Nothing in petitioners' allegations pleads facts showing a pre-existing "arrangement . . . to provide health benefits or medical care or assume legal liability for" injured smokers. App. 48a.

CONCLUSION

Petitioners have failed to identify any conflict between the decision of the Second Circuit and the holding of any other court. The petition raises no question worthy of *certiorari* and should be denied.

Respectfully submitted,

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